87-239

Supreme Court, U.S.
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No.: _____

IN THE

Supreme Court of the United States

October Term, 1986

JAMES MOYE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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22pp

Questions Presented for Review

1. Whether After Voluntary Disclosure of the Paid Informer's Identity the District Court Could Refuse to Provide the Defense With the Informer's Debriefings of the Criminal Activity for Which the Defendant Stands Convicted, Despite No Other Claim of Privilege or Need of Redaction Set Forth by the Government?

2. Whether a Trial Court, Which as a Result of Its Own Review of Unprivileged and Discoverable Documents, Denies Same to the Defense Because of Its Subjective Finding That No Exculpatory Matter Exists, Has Usurped a Function of Defense Counsel and Thus Deprived the Defendant of Effective Assistance of Counsel?

List of Parties

Apart from the party named in the caption of this Petition, no other parties were involved in this matter.

Table of Contents

Questions Presented for Review i

List of Parties i

Table of Authorities iii

Opinion Below 1

Jurisdiction 2

Statutes, Federal Rules and Regulations Involved 2

Statement of the Case 3

A. Introduction 3
B. The Government's Proof At Trial 4
C. The Defense Case 5
D. The Demand for Debriefings 6
E. The Opinion of the Court of Appeals 6

Reasons for Granting the Writ 7

Point I -- After a Voluntary Disclosure of the Identity of a Confidential Informer to Those Who Would Have Cause to Resent the Communication, the Privilege Is No Longer Applicable. 7

Point II -- The Trial Court's Review of Unprivileged and Discoverable Documents and Its Refusal to Turn Them Over to the Defense Was an Unwarranted Intrusion on a Defense Function and Denied the Defendant Effective Assistance of Counsel. 8

Conclusion 10

Appendix A -- Opinion of United States Court of Appeals 1a

Appendix B -- Minutes of Oral Opinion of District Court Given During Trial of Petitioner 5a

Table of Authorities

Cases:

Brady v. Maryland,
373 U.S. 83 (1963) 6, 10

Hodgson v. Charles Martin Inspectors of Petroleum, Inc.,
459 F.2d 303 (5th Cir. 1972) 7

Mitchell v. Bass,
252 F.2d 513 (8th Cir. 1958) 7

Rovario v. United States,
77 S.Ct. 623 (1957) 7

United States v. Lilla,
699 F.2d 99 (2d Cir. 1983) 6, 8

United States Constitution:

Sixth Amendment 2, 9

Statutes:

18 U.S.C. § 2 3
21 § 812 3
21 § 841 3
21 § 846 3
28 § 1254(1) 2

Other Authorities:

Federal Rules of Criminal Procedure
Rule 29 3

Federal Rules of Evidence
Rule 501 3
Rule 806 ..... 2, 8

Federal Rules of Evidence Manual,
Saltzburg & Redden, 4th Edition, Vol. 1,
Part Two, Rule 501, p. 345 7

Weinstein's Evidence, Weinstein & Berger,
United States Rules 2, Privileges, p. 510-3 ... 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Robert M. Simels, on behalf of Petitioner, James Moye, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on the 16th day of June, 1987, affirming the judgment of conviction and sentence of the District Court.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, an unpublished opinion, is appended to this Petition as Appendix A.

Jurisdiction

The judgment and order of the Court of Appeals for the Second Circuit was made and entered on June 16, 1987 and is part of the unpublished opinion appended to this Petition as Appendix A.

The jurisdiction of this Court is invoked under Title 28 United States Code § 1254(1).

Statutes, Federal Rules and Regulations Involved

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 806 of the Federal Rules of Evidence provides:

> When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E) has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Rule 501 of the Federal Rules of Evidence provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Statement of the Case

A. Introduction

On August 28, 1986, the Petitioner was indicted in a four-count indictment (86 CR 731). Count One charged him with conspiring with his brother, Rubin Moye, and sister, Denise Moye, to violate the federal narcotics laws (Title 21 U.S.C. § 846). Count Three charged the Petitioner and Denise Moye with distribution of narcotics and/or aiding and abetting the same on May 8, 1985 (Title 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(B), and Title 18 U.S.C. § 2). Denise Moye was also charged in two additional substantive counts.

Denise Moye pled guilty to all four counts prior to Petitioner's trial. Rubin Moye, who was only charged in the conspiracy count, had that count dismissed at the end of the government's case for lack of evidence pursuant to Rule 29, F.R.Crim.P. The Petitioner was acquitted of the conspiracy charge but convicted of the substantive count (Count Three) and ultimately sentenced to ten years imprisonment.

B. The Government's Proof At Trial

The testimony pertinent to this petition was given by Special Agent Everett Hatcher ("Hatcher") of the Drug Enforcement Administration ("DEA") who was operating in an undercover capacity.

On April 29, 1985, Hatcher arrived in the area of 118th Street in Manhattan accompanied by Tanita Greene ("Greene"). Hatcher initially described Greene to the jury as, "an interested black female who wanted to do her part in the drugs in that particular vicinity." Later cross-examination of Hatcher and other members of the DEA showed Greene was a convicted narcotics felon who had become a confidential informant for the DEA and who was paid for every successful buy she arranged for the undercover agent in this and other cases.

Hatcher's testimony indicated that Greene soon exited his car that evening and met with Denise Moye ("Denise"). Greene made a phone call at a pay phone and then brought Denise over to Hatcher. Greene introduced Denise as Petitioner's sister. Denise and Hatcher then conversed about Hatcher's desire to purchase drugs and Denise told Hatcher that the Petitioner was out of drugs but that she could supply him from another source on 117th Street. Denise then inquired of Greene as to what price Petitioner had given her for the drugs (Greene telephone call) and Greene responded, "35 for a quarter."

Ultimately, Hatcher agreed to purchase a sample and all three went to a location on 117th Street from which a young woman emerged and gave two glassine envelopes to Denise and she gave them to Hatcher. Hatcher and Greene then drove to meet a field-test unit where the sample showed heroin present.

Later Hatcher, Greene and Denise returned to 117th Street in Hatcher's car. Hatcher gave Denise $1,850 in the car and she and Greene went into the location. They came out after a few minutes and Greene handed Hatcher the narcotics. The three then went to 125th Street in Hatcher's car, where Denise gave Hatcher two phone numbers where she could be reached.

On May 8, 1985, Hatcher again arrived in the area with Greene. Denise entered the car and began to negotiate a narcotics deal with Hatcher saying that this time it will be Petitioner's drugs and she pointed to him as he stood nearby. Greene and Denise exited the car and went over to the Petitioner and Denise spoke to him. Hatcher could not hear the conversation but saw Petitioner's head nod up and down.

Denise and Hatcher left the area because of alleged "heat," and returned some 25 minutes later. At that time, Denise exited the car and joined Greene and the Petitioner. The three walked around the corner and out of Hatcher's sight.[1] After better than five minutes, Greene and Denise returned and entered Hatcher's car. Denise handed Hatcher a package containing 100 glassine envelopes of heroin.

C. The Defense Case

The Petitioner did not testify and the sole defense witness was to establish that Denise was a hopeless "crack" and cocaine addict.

The entire defense was set to establish that Denise and her friend and fellow addict, Greene, had set out to sell drugs to Hatcher. The defense argued that using Hatcher's obvious interest in "nailing" the Petitioner, who was the target of the investigation, the two happily sold Hatcher drugs claiming they came from the Petitioner.

The defense pointed to the sales of April 29, 1985 and May 14, 1985 being made entirely by Greene or Denise or both. Further, Petitioner argued the drugs of May 8, 1985 could have come from anywhere and only Denise and Greene would know the truth.

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[1] The agent's reports made almost contemporaneously with the occurrence state that only Greene and Denise walked around the corner but the trial testimony added the Petitioner.

D. The Demand for Debriefings

During cross-examination of Hatcher, the defense pressed him as to what questions, if any, he put to Greene after the sales of April 29, 1985 and May 8, 1985. After all, the defense argued, the narcotics of both days were supplied by parties outside the view of Hatcher and presumably within the view of Greene, who handed Hatcher the narcotics of April 29, 1985 and returned with Denise, who was carrying the packages on May 8, 1985. Hatcher claimed he wasn't interested in what happened outside his presence and asked Greene no questions. He did reveal, however, that Greene had been completely debriefed as to all the events of both days by another DEA agent.

The defense demanded the production of those two documents. The District Court ruled that they need not be produced but ultimately the government produced them and gave them to the court. The government remarked to the court, "I believe you will find that they are simply a recitation of what she saw and heard on the days that she participated." The court reviewed them over the lunch hour and declared that they did not disclose any *Brady* material. "Essentially," the court said, "they are similar to the testimony which has been presented here."[2]

E. The Opinion of the Court of Appeals

The June 16, 1987 opinion of the Second Circuit Court of Appeals stated that since the trial court reviewed the documents and found that they contained no exculpatory material, there was no abuse of discretion in the refusal to provide the documents to Petitioner. *United States v. Lilla,* 699 F.2d 99, 105-106 (2d Cir. 1983).

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[2] The trial minutes reflecting the District Court's oral opinion are annexed as Appendix B.

Reasons for Granting the Writ

Point I

After a Voluntary Disclosure of the Identity of a Confidential Informer to Those Who Would Have Cause to Resent the Communication, The Privilege Is No Longer Applicable.

At the pretrial stages of this case, the government refused to divulge the name of the confidential informant or acknowledge the existence of any statements by or debriefings of the confidential informant. However, at trial, their main witness, Hatcher, not only revealed the name of the paid confidential informant, Greene, but proceeded to reveal her participation in every important facet of the case as well as to testify to her statement of an alleged conversation she had with Petitioner. The existence of the two debriefings of Greene of the events of April 29, 1985 and May 8, 1985 was also revealed.

It is undisputed that the so-called informer's privilege applies solely to identity and not to communications unless they would reveal an undisclosed informer. *Roviaro v. United States,* 77 S.Ct. 623, 627 (1957); *Weinstein's Evidence,* Weinstein & Berger, United States Rules 2, Privileges p. 510-3; *Federal Rules of Evidence Manual,* Saltzburg & Redden, 4th Edition, Vol. 1, Part Two, Rule 501, p. 345.

What is even more clear is that after voluntary disclosure of the informant's identity, the communications of the informer are subject to discovery. *Mitchell v. Bass,* 252 F.2d 513 (8th Cir. 1958). *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.,* 459 F.2d 303 (5th Cir. 1972) (directing modification so as not to release communications of informers not already identified as such).

The government did not set forth any other claim of privilege in the trial court or in the circuit court. Nor did it allege any need for redaction because of intrusion on other investigations. The debriefings were not privileged, contained pertinent material, and were timely demanded

by the defense. Further, Hatcher had testified to Greene's narcotics-related conversation with Petitioner which makes this document discoverable under F.R.Evid. Rule 806. For all the foregoing, they should have been turned over to the defense.

The opinion of the Second Circuit, while seeming to hold that the matter is discretionary with the trial court, is somewhat in doubt. The circuit court relied on *United States v. Lilla, supra,* but in *Lilla* the identity of the informer had not been revealed. Where the informant's identity has not been made known, *in camera* proceedings have universally been regarded as a useful means of balancing the government and defense needs.

To the extent that the Second Circuit holds that after a voluntary disclosure of an informant's identity his communications are discoverable only at the discretion of the trial judge, there is certainly a conflict between the Second, Fifth, and Eighth Circuits.

Point II

The Trial Court's Review of Unprivileged and Discoverable Documents and Its Refusal to Turn Them Over to the Defense Was an Unwarranted Intrusion on a Defense Function and Denied the Defendant Effective Assistance of Counsel.

Greene was a paid professional informant whose exploits enter every phase of this case and most importantly those of May 8, 1985, for which the Petitioner stands convicted. Further, despite the voluntary disclosure of Greene's identity and no other claim of privilege, the trial court undertook to review the debriefings of Greene concerning the events of April 29, 1985 and May 8, 1985.

Such a review serves no purpose where it is not necessary to balance the government and defense needs such as when the informer had not been identified. More importantly, such a review usurps a defense function and allows the trial judge's opinion to decide what is

helpful to the defense and what is not. To deprive the defense of defense counsel's review is to deny the defendant effective assistance of counsel (Const. Sixth Amendment).

The defendant's pretrial demand for the name and communications of the confidential informant reflected its interest in evaluating her as a possible witness. After Hatcher's testimony, her importance was evident and whether she or the interviewing agent should be called as a witness was a decision for defense to make and the contents of the documents in question were pivotal to that determination. The district court's action prevented the defendant from having the opportunity to properly evaluate the confidential informant or interviewing agent as a witness.

Additionally, if one were to accept the district court's finding as reflective of the contents of the debriefing, then one must conclude that the court failed to properly recognize its exculpatory nature. Witness what has occurred. The government commented that, "They are simply a recitation of what she saw and heard on the days that she participated." The trial court said, "Essentially, they are similar to the testimony which has been presented here." Other than assuring all of the relevancy of the material, both the government and the court failed to see the exculpatory value of the debriefings.

The defense's theory throughout the trial was that Greene and Denise supplied their own drugs to Hatcher and that the Petitioner was used by them because of Hatcher's interest in involving Petitioner. Hence, if Greene's debriefings told nothing of what happened outside of Hatcher's view, the defense could present a consistent argument that she was covering up her own scheme. If the inquiring agent, as Hatcher claimed he did, also failed to ask any questions about what happened when she was with Petitioner away from government view -- then certainly the defense's theory of cover-up is even more substantiated.

One must remember that the government's argument to the jury was that Petitioner supplied the drugs on May 8, 1985 after he, Greene, and Denise left Hatcher's sight. Therefore, the contents of the debriefing goes beyond impeachment material or redundant matter. The information was material to show the innocence of the defendant and came from the only available source of direct evidence.[3] *Brady v. Maryland*, 373 U.S. 83 (1963). If, as the government and district court said, there was no matter other than what was testified to, then the Petitioner's defense has been upheld. In this case, information which is merely cumulative is, by definition, exculpatory. That the trial court did not comprehend its importance is but another clear indication that this Court should ascribe error to any effort to substitute for the judgment of chosen counsel on matters intimate to the defense.

Conclusion

For all the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Dated: New York, New York
August 12, 1987

Respectfully submitted,

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[3] The materiality of this information and the impact it would have on the verdict is especially clear from the defendant's acquittal of the conspiracy charge.

APPENDICES

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of June, one thousand nine hundred and eighty-seven.

PRESENT:
HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE AMALYA L. KEARSE,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

- v. -

JAMES MOYE,
Defendant-Appellant.

No. 87-1080

Filed June 16, 1987

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix A
Opinion of the United States Court of Appeals

ON CONDSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Defendant James Moye appeals from a final judgment of the United States District Court for the Southern District of New York, following a jury trial before Robert J. Ward, *Judge,* convicting him of distributing heroin and possessing heroin with intent to distribute it, in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2. On appeal, Moye contends that he was denied a fair trial by the government's failure to disclose the name and whereabouts of its confidential informant and by the failure of the trial court to give a missing witness charge to the jury, challenges the court's admission of coconspirator statements, and argues that the court should have suppressed the fruits of a search of his home pursuant to a search warrant. Finding no merit in any of his contentions, we affirm the judgment.

The government has a limited privilege to withhold the identity of persons who furnish information of criminal activities to law enforcement officials; the court may properly recognize this privilege where there is legitimate concern for the safety of the informant. *See, e.g., Roviaro v. United States,* 353 U.S. 53, 59 (1957); *United States v. Napolitano,* 761 F.2d 135, 139 (2d Cir.), *cert. denied,* 106 S.Ct. 129 (1985). There being evidence that one of the government's other confidential informants had been viciously beaten by one of Moye's alleged coconspirators and others, it was not an abuse of discretion for the court not to require the government to confirm Moye's contention as to the identity of the informant in the present case. Since the trial court reviewed related documents whose production was requested and found that they contained no exculpatory material, we also find no abuse of discretion in the refusal to provide those documents to Moye. *See United States v. Lilla,* 699 F.2d 99, 105-06 (2d Cir. 1983).

Moye's contention that the court erred in refusing to give a missing witness instruction has been waived because no timely objection was made in the district court. *United States v. Lighte*, 782 F.2d 367, 373 (2d Cir. 1986).

We reject on its merits Moye's contention that the district court should have suppressed the evidence seized from his home pursuant to a search warrant. Moye's presentation in the district court did not amount to a substantial preliminary showing, *see Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), that the affidavit on the basis of which the search warrant had been issued contained false statements made knowingly or intentionally, or that the challenged statements were necessary to the magistrate's finding of probable cause, *see United States v. Levasseur*, 816 F.2d 37, 43 (2d Cir. 1987). The only statement in the affidavit that Moye claimed was false was one that was inconsequential. Moye's contention that, because certain facts recited in the affidavit described events that occurred several weeks earlier, the warrant was impermissibly based on stale testimony is unpersuasive in light of the evidence of his substantial operation over a period of more than a year.

Finally, we reject Moye's challenge to the admission of statements of his alleged coconspirators. The independent evidence of Moye's participation in an ongoing narcotics distribution conspiracy with his sister -- which included the observations of law enforcement officials as to Moye's own actions and the presence of narcotics distribution paraphernalia in the residence shared by Moye with his alleged coconspirators -- was sufficient to satisfy the requirements of *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied.*, 397 U.S. 1028 (1970).

Appendix A
Opinion of the United States Court of Appeals

We have considered all of Moye's properly preserved arguments and have found them to be without merit. The judgment of conviction is affirmed.

/s/ _____
Ellsworth A. Van Graafeiland, U.S.C.J.

/s/ _____
Amalya L. Kearse, U.S.C.J.

/s/ _____
J. Daniel Mahoney, U.S.C.J.

Appendix B
Minutes of Oral Opinion of District Court Given During Trial of Petitioner

THE COURT: Ladies and gentlemen, we will recess at this time until 10 a.m., ten o'clock tomorrow morning.

Please, do not discuss the case among yourselves. If you learn anything about the case from any source outside the courtroom, you are directed to report the matter to Mr. Guranich upon your return.

Finally, please keep an open mind on all facets of the case until the case has been concluded to you and given to you following my charge.

I should be able at some point during the day tomorrow to give you an idea of the time schedule for the balance of the case. It is still my expectation that the case will go into the early part of next week, but I will know more tomorrow and will convey that information to you before we recess tomorrow. I would remind you once again, we will not be sitting on Friday.

The jury is excused until 10:00 a.m. tomorrow morning. Good night. Get home safely.

(Jury excused)

THE COURT: The jury has left. I would advise counsel that during the course of the afternoon I read the statements of April 29, 1985 and May 8, 1985, which were referred to before we started this afternoon by Mr. Standiford. My reading of the statements does not disclose any Brady material.

Essentially, they are similar to the testimony which has been presented here. Accordingly, I would ask whether counsel wish me to have these statements placed under seal or, alternatively, to return them to Mr. Standiford?

Appendix B
Minutes of Oral Opinion of District Court
Given During Trial of Petitioner

MR. SIMELS: I think, your Honor, if the court wishes to have them perhaps marked, at least for identification purposes, you can return them to the government.

THE COURT: Very well. They will be called Court's Exhibit 1. That will be the statement of April 29, 1985, and Court's Exhibit 2, the statement of May 8, 1985, unless you want them marked as Government's Exhibits higher numbers for identification.

MR. STANDIFORD: Court's Exhibits 1 and 2 is perfectly fine, your Honor.

There is one other item. Mr. Cohen asked about the arrest DEA 6 of James Moye. I have prepared --

THE COURT: Off the record.

(Discussion.)

MR. STANDIFORD: Your Honor, this is the arrest DEA 6 that was --

THE COURT: Mr. Cohen requested it.

MR. STANDIFORD: Mr. Cohen requested it, yes. I....